No. 86-89

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

BILLY GENE MILLER,

*Petitioner,*

*v.*

MARY LOUISE MILLER,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Kim W. Cheatum
LIGHTNER & CASTRO
3104 Fourth Avenue
San Diego, California 92103
(619) 291-4500

*Counsel of Record*

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

## QUESTIONS PRESENTED

1. In 1975, when Petitioner left California finally in favor of his military home of record, Washington, did he carry with him any Due Process rights protecting him from having to defend in California a claim by Respondent, his former spouse, which was outside of their 1970 divorce judgment and unknown to both parties at the time of his move? Or, does an individual's "minimum contacts" with a forum State remain imprisoned there forever regardless of the passage of time or how innocently he exercises his constitutional right to travel?

2. If such Due Process protection accompanied him, can California, after Petitioner's exclusive and continuous residency in Washington for over eight (8) years, order him to defend there a claim that arose (if at all) not because of Petitioner's conduct in California, but rather, by virtue of a 1983 federal statute?

3. Does conditioning the exercise of the right of travel on a waiver of the liberty interest protected by the Due Process Clause violate the Constitution?

## LIST OF PARTIES

The parties to the proceedings below are the same parties to this proceeding, namely, Petitioner Billy Gene Miller and Respondent Mary Louise Miller. There have been and are no other parties.

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No. _____

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OCTOBER TERM, 1986

BILLY GENE MILLER,

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

The Petitioner Billy Gene Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Fourth Appellate District, Division One, finalized in the above-entitled proceedings on April 28, 1986.

## OPINIONS BELOW

The opinion of the California Court of Appeal for the Fourth Appellate District is reported at 176 Cal.App.3d 1183, and is reprinted in the appendix hereto, p. 1a, *infra* ("Opinion"). There was no petition for rehearing filed. On April 23, 1986, the Supreme Court for the State of California denied Petitioner's Petition for Review without comment.

## JURISDICTION

On March 13, 1984, the Superior Court for the County of San Diego, State of California, granted Petitioner's motion to quash service of process and dismiss Respondent's complaint for lack of personal jurisdiction. On January 28, 1986, the Court of Appeal for the Fourth Appellate District reversed and remanded in an opinion certified for publication. On April 23, 1986, the California Supreme Court denied Petitioner's Petition for Review and on April 28, 1986, a remittitur issued from the Court of Appeal indicating that the decision was final.

The jurisdiction of this Court to review the Judgment of the California Court of Appeal is invoked under 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the

> same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure Section 410.10:

> A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States.

## STATEMENT OF THE CASE

On June 24, 1948, Petitioner entered the United States Navy listing the State of Washington as his home of record. In February, 1953, he married Respondent in California, where they lived during his military assignment.

In May, 1969, Respondent filed a complaint for divorce claiming that Petitioner was at "fault" for the breakdown of their marriage, and accordingly, that their property should be divided

disproportionately. On June 27, 1969, Petitioner answered, and in order to avoid an unequal division of property, expectedly filed a cross-complaint for divorce alleging that Respondent was at "fault." To file such a complaint, California law required that Petitioner allege that he "has been a resident of the State of California for more than one (1) year. . . ."

The parties proceeded to settle all of their marital rights by way of an agreement, which was incorporated by reference into an Interlocutory Judgment entered on July 1, 1970. The Judgment made no reference to the military retirement pension in Petitioner's name.

On January 1, 1970, before the parties settled their marital rights, Petitioner retired from the United States Navy after over twenty (20) years of continuous service. On his military discharge papers he again designated the State of Washington as his "home of record." He then moved to New Jersey, but returned to California in 1972, where he stayed for approximately three (3) years. In 1975 he moved to Washington where he since has continuously resided.

In February, 1983, the United States Congress passed the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (FUSFSPA). Nine (9) months later, in December, 1983, Respondent filed a complaint against Petitioner in the Superior Court for the County of San Diego, State of California, by which she sought to partition his military pension. Petitioner appeared specially to quash service of process and dismiss the proceedings for lack of personal jurisdiction. The trial court granted his motion ruling that Petitioner "was neither a California resident, domiciliary in this State, nor has consented to the jurisdiction of this Court *as of the date the partition action was filed*." Opinion, p. 3a, *infra* [emphasis in original].

On appeal, the court reversed, reasoning that "for purposes of obtaining personal jurisdiction over an out-of-state defendant, it is

the residence or domicile of that person *at the time the operative facts which allow plaintiff to file an action converge* that is relevant, not whether defendant has changed residence or domicile before the action is *filed*." *Id.* at 3a [emphasis in original]. In this regard, the court

> determined the date, as to which the contacts should be evaluated, is 1969. As of that date, [Petitioner] declared himself a California resident for the purpose of the jurisdictional requirements of obtaining a divorce from [Respondent]. Although termed 'residency,' the legal requirements for California divorce jurisdiction are synonymous with 'domicile.' [Citations omitted.] Thus, for purposes of personal jurisdiction, [Petitioner] conclusively declared he was domiciled in California for more than one (1) year prior to June, 1969.

*Id.* at 4a.

Petitioner argued that the definition of "court order" in FUSFSPA precludes the formation of subject matter jurisdiction from which even a cause of action could arise. Even if it could, a 1983 statute which by its express terms is retroactive at most to 1981 cannot be construed to create a cause of action in 1969. Most importantly, Petitioner argued below and argues vigorously now that the focus is not on the State boundaries at the time the cause of action arose, but rather, on due process "minimum contacts" sufficient to conclude that Petitioner invoked the benefits and protections of California law contemporaneous with the assertion of jurisdiction against him.

## REASONS FOR GRANTING THE WRIT

**Conflict.**

In a case involving facts substantially parallel to *Miller v. Miller*, the California Court of Appeal for the First Appellate District recently refused to subscribe to the *Miller* rationale. *Tarvin v. Tarvin*, reprinted in the Appendix hereto, p. 8a, *infra*. Specifically, the court concluded that "[d]ue process concerns dictate that the time for evaluation of jurisdictional contacts should be the time that the partition action is filed." Appendix, p. 11a, *infra*. As a result, there are at least two (2) cases in conflict with each other on an important question of federal law.

**Importance.**

At one time, the power to enter a binding judgment was determined by a State's boundary. As a result of technological progress in communications and transportation, though, personal jurisdiction over a nonresident defendant turned on "minimum contacts" not offensive to "traditional notions of fair play and substantial justice."

This case presents the need to examine the impact of technological progress on personal jurisdiction a step further on the evolutionary ladder. Specifically, because of such progress, can contacts once "minimum" become stale, and therefore, offensive to the Due Process Clause?

For the reasons to follow, Petitioner argues that minimum contacts do not remain imprisoned in the forum State forever. Rather, when an individual exercises his right of interstate travel, panies him. Any other conclusion would unconstitutionally condition the exercise of the right to travel on the waiver of this liberty interest. So the question is not that contacts once pleasing to the Due Process Clause never become displeasing, but rather, when?

In response, the focus is on the defendant, not on the State's boundaries or when the cause of action arose. Specifically, the sensitivities of the Due Process Clause require guidelines supplying predictability to the legal system so that an individual has some assurance as to where his conduct will expose him to suit. To this end, the proper inquiries are: (1) During the period of time of the individual's "minimum contacts" with the forum State, was he given fair warning of, or did he anticipate or expect, being haled into its courts to defend a claim related to these contacts?; and (2) If he did, is there the requisite temporal proximity between this expectation and the individual's receipt of benefits and protections of the forum State.

In a country where the population is growing and not getting any less mobile, these questions are impacting on a large portion of its citizenry. Because of the lack of clear judicial answers, the impact is unknown, and therefore, significant. Answers are needed, and to this end, the petition should be granted.

## A. THE ONLY GROUND FOR EXERCISING PERSONAL JURISDICTION AGAINST PETITIONER IS THAT OF DOMICILE.

Section 1408(c)(4) of FUSFSPA provides:

> A court may treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

Because Petitioner did not consent and he was not a resident of California for reasons other than military assignment, the only

remaining jurisdictional basis, therefore, was domicile. Opinion, 5a, *infra*. But a domiciliary when? At the time the cause of action arose, when the complaint was filed, or when it was served? Are these questions even satisfactory?

## B. THERE IS NO TEMPORAL PROXIMITY BETWEEN PETITIONER'S RECEIPT OF CALIFORNIA BENEFITS AND THE ASSERTION OF JURISDICTION AGAINST HIM.

### 1. There Must Be Minimum Contacts Independent Of The Divorce Judgment.

Introductorily, it is important to first discuss what this case is not. We are not discussing a recent marital separation where one spouse has unilaterally moved from California to Washington with the intent of defeating jurisdiction. Nor are we dealing with a divorce judgment that reserves jurisdiction to divide a military pension at a later time which would otherwise permit jurisdiction over the parties to continue "throughout subsequent proceedings in *the action*." California Code of Civil Procedure Section 410.50(b). [Emphasis added.]

Instead, Petitioner and Respondent are parties to a 1970 final judgment adjudicating all of their marital property rights. Therefore, these rights "shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525-26 (1930). Hence, this is not a case involving any expectations related to or arising out of the divorce judgment. It follows, then, that this civil proceeding must be supported by its own personal jurisdiction grounds.

### 2. Petitioner's "Minimum Contacts" Cannot Be Constitutionally Imprisoned In California Forever.

When discussing the propriety of exercising personal jurisdiction over a non-resident defendant, "it is essential in each case that

there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This requirement is satisfied when the non-resident purposely engages in commercial activity within the forum State with the intent or expectancy of receiving an economic benefit. *Kulko v. California Superior Court*, 436 U.S. 84, 97, 100-01 (1978). This makes sense.

If a State confers benefits and protections, it can require the recipient to do something. But can the right to make this request be lost by the passage of time? For instance, if California has not given anything to Petitioner and he has not asked for anything since 1975, can California in 1985 order Petitioner to return to defend a claim neither party thought existed, if at all, until 1983? In short, is one constitutionally present in a forum State forever?[1] Can he ever be paroled from his bondage? Can a State prevent one from ever leaving?

In response, the answer is not to measure the burden of having to return and defend.

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

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[1] If a resident has a legal or equitable claim against a non-resident, but does not assert it for decades, the defendant must make a general appearance to advance the defenses of statute of limitations or laches. Could this non-resident, assuming there were minimum contacts when the claim arose, ever appear specially to quash for lack of personal jurisdiction and prevail?

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1979). "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Hanson v. Denckla, supra*, 357 U.S. at 251.

To the point, "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1981). That is, the individual is protected from being subject to a binding judgment of a State that has not supplied him with the benefits and protections of its laws. *Hanson v. Denckla, supra*, 357 U.S. at 253.

By supplying this protection, "the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, __ U.S. __, 105 S.Ct. 2174, 2182 (1985). Thus, the exercise of *in personam* jurisdiction over a non-resident is pleasing to the Due Process Clause when he has "*fair warning* that a particular activity may subject [him] to the jurisdiction of a foreign sovereign" [*Id.*, emphasis added], or his "conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there." *Id.*, at 2183 [emphasis added].

For example, if a couple has overwhelming marital contact with the State of California, and then separate while there, both have the expectation that California law will dispose of their marital rights. To this end, neither can unilaterally relocate outside California to defeat jurisdiction there.

In the present case, though, Petitioner's permanent relocation to Washington in 1975 was preceded by a 1970 final judgment disposing of all rights. From 1970 to 1975, even 1983, neither

party had any expectation that Petitioner's military pension would be treated as anything other than his. *Accordingly, not even Respondent in 1975 could forewarn that Petitioner would ever have to defend a civil action in California to divide his military pension, assuming it is divisible.*[2]

*If the fair warning or anticipation of the lawsuit in California satisfies due process protection, the converse is true, namely, that no expectation of ever having to defend is likewise an individual liberty interest protected by the Due Process Clause. Thereafter, not all the passage of time, federal statutes, or activity of plaintiff can supply, or be a substitute for, "minimum contacts" so as to please the Due Process Clause.*

Rather, the focus is on the conduct of the non-resident defendant. Remember, "[i]t is essential in each case that there be some act by which *the defendant* purposefully avails itself with the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra*, 357 U.S. at 253. [Emphasis added.]

In this regard, Petitioner has not engaged in any purposeful conduct in California. California in turn has not supplied him with any of the benefits and protections of its laws. Therefore, California has no right to order Petitioner to defend here. To rule other-

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[2] Petitioner makes three related points here: First, when he moved, it cannot be said that Petitioner was in any way trying to defeat a claim that did not exist in either party's mind. Second, this "no expectation" argument is not based exclusively on the legal ruling made in *McCarty vs. McCarty*, 453 U.S. 210 (1981). Factually, from 1970 to 1983, there is no evidence that either party knew that Respondent had, or could even assert, the instant claim. In this spirit, it is not coincidental that she filed her lawsuit after FUSFSPA was passed. As argued later, expectations of a defense that arises as a result of a statute, not the purposeful conduct of the defendant in the forum State, do not satisfy the requirements of the Due Process Clause. Third, the only person that knew Respondent had a cause of action in 1969 was a California Court of Appeal Justice in 1985 as a result of a 1983 federal statute retroactive only to June 1981. This omniscience is not a substitute for due process purposeful conduct.

wise would be tantamount to saying that a State can order a person to be in "minimum contact" with it forever, regardless of the passage of time or how innocently he exercises his constitutional right to travel. Under such circumstances, how can there be any predictability or order "that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit?" *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 297. How can there be a liberty interest protected by the Due Process Clause when a person loses it upon exercising his constitutional right to interstate travel?

### C. CALIFORNIA UNCONSTITUTIONALLY PENALIZED PETITIONER FOR EXERCISING HIS RIGHT TO TRAVEL.

During the *Pennoyer v. Neff*, 95 U.S. 714 (1878) era, personal jurisdiction rules rested on "the mutually exclusive sovereignty of the States. . . ." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1976). Now, the same rules rest on "individual liberty interest." *Insurance Corp. v. Compagnie des Bauxites, supra*, 456 U.S. at 702. As a result, State sovereignty is no longer "exclusive", but rather is "coequal." *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 292.

> The sovereignty of each State in turn, implied a limitation on the sovereignty of all of its sister States - a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

*Id.* at 293. That is, the sovereignty of Washington is a restriction on the sovereignty of California, and vice-versa. This restriction takes on special meaning when one exercises his constitutional right to travel.

"The constitutional right of interstate travel is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 (1977).

> The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clause of the Fifth and Fourteenth Amendment. Whatever its source, a State may neither tax nor penalize the citizen for exercising his right to leave one State and enter another one.

*Jones v. Helms*, 452 U.S. 412, 418 (1980).

When this right is exercised, the individual in effect is engaging in conduct by which he "purposefully avails [himself] of the privilege of conducting activities within the [new] State thus invoking the benefits and *protections* of [the] laws [of a co-equal sovereign]." *Hanson v. Denckla, supra*, 357 U.S. at 253 [emphasis added]. That is, the State acquires an obligation to protect the individual liberty interest of its citizens under the Due Process Clause. Consequently, by virtue of the right of travel, we have the interest and obligations of a co-equal sovereign at stake as well.

In this context, a tension develops between the two (2) co-equal sovereigns. On the one hand, the old State wants to provide its citizens with legal redress even if it means exercising *in personam* jurisdiction over a defendant who in the interim has moved to a sister state. On the other hand the new sister state has an obligation to protect its citizens from having to defend in the former State.

To balance these competing interests, Petitioner submits that it is critical whether the relocating party had any warning whether he would ever have to return, for instance, to California and defend against a claim by Respondent. If he did not, then at the point in time of the move, California had no interest in permitting Respondent to pursue a claim against Petitioner there regardless of

the claim's relationship to their marital contacts in that State. In the meantime, Petitioner began putting on the armor plate of the laws of Washington, whose sovereignty limits California's.

*In this spirit Petitioner maintains that an individual can be freed from the* in personam *jurisdiction power of a former sovereign. In other words, because of the individual liberty interest and the right to travel, a person can leave a state with Due Process protection of being free of any encumbrance not anticipated at the time of the move or having no temporal relationship with the receipt of benefits from the forum state. To determine whether personal jurisdiction exists by the mechanical and insensitive process of when the cause of action arises, however, is to say that he never left the state with such protection. Therefore, the California Court of Appeal unconstitutionally conditioned the exercise of the unqualified right to travel on the waiver of due process protection. See, Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1968). Such a waiver amounts to a penalty [*Id.*] which can be justified only by compelling state interest [*Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 258]. When the state determines the cause of action arises does not satisfy this interest.

## D. IT IS IRRELEVANT WHEN STATE LAW CONCLUDES WHEN A CAUSE OF ACTION ARISES.

In finding personal jurisdiction, the California Court of Appeal ruled that Respondent's cause of action arose in 1969. Petitioner was estopped to deny he was a domiciliary at that time because in order to protect his property rights, he had to allege he was a resident of the State of California for one year. Although Petitioner disagrees with this conclusion, for purposes of personal jurisdiction, when State law determines when the cause of action arose is irrelevant.

When a cause of action arises may vary from state to state. *See, Shaffer v. Heitner, supra*, 433 U.S. at 206. Yet, the liberty interest

protected by the Due Process Clause should be protected uniformly ("federally"), independent of the differences of State law. Accordingly, a State

> does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellant].

*Id.* at 215 *quoting Hanson v. Denckla, supra*, 357 U.S. at 254; *accord, Kulko v. California Superior Court, supra*, 436 U.S. at 98. Therefore, a finding of personal jurisdiction must be supported solely by the purposeful acts of the defendant. To support it when State law concludes the cause of action arose would be to resurrect the ghost of *Pennoyer v. Neff, supra*, when State boundaries, not due process minimum contacts, were determinative.

Over one hundred (100) years ago, this Court ruled that the "authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Pennoyer v. Neff, supra*, 95 U.S. at 720. Hence, a defendant's "presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

> As technological progress has increased the flow of commerce between States [however], the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a forum tribunal less burdensome.

*Hanson v. Denckla, supra*, 357 U.S. at 250-51. As a consequence, the exclusive sovereignty of a State recognized by *Pennoyer* "has

given way to personal service of summons or other form of notice [such that now] due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, supra*, 326 U.S. at 316.

In California, the collapse of the *in personam* wing of *Pennoyer* resulted in the legislature passing Code of Civil Procedure Section 417 in 1951, which provided:

> Where jurisdiction is acquired over a person who is outside this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service.

*Smith v. Smith*, 45 Cal.2d 235, 237 (1955). Hence, when there was an issue of *in personam* jurisdiction over a non-resident the courts examined rigidly whether the non-resident was a domiciliary at the time the cause of action arose. *Owens v. Superior Court*, 52 Cal.2d 822 (1959); *Allen v. Superior Court*, 41 Cal.2d 306 (1953).

In 1969, the California legislature passed Code of Civil Procedure Section 410.10 which provides:

> Courts of this State may exercise jurisdiction under any basis not inconsistant with the Constitution of this State or the United States.

Consequently, in California as well, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer*

rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer v. Heitner, supra*, 433 U.S. at 204. Presence does not necessarily create jurisdiction nor does non-presence necessarily defeat it.

"But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of State courts." *Hanson v. Denckla, supra*, 353 U.S. at 251; *accord, World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 293. It remains essential that there be some purposeful conduct by which the non-resident defendant intends or expects to receive some commercial or economic benefit in the forum State. *Kulko v. California Superior Court, supra*, 436 U.S. at 97, 100-01. *That is, the focus is on the individual's relationship with the State, on "minimum contacts," not on the State's boundaries or when it determines the cause of action arose. To this end, the question is that if this relationship was once pleasing to the Due Process Clause, can it become displeasing by the passage of time together with the exercise of the constitutional right to travel innocent of any intent to defeat jurisdiction?*

Petitioner argues that minimum contacts can become stale for three (3) reasons: *First, as already argued there must be some temporal proximity between the conduct giving fair warning or anticipation of a defense and the conduct engaged (e.g., domiciliary status) with the intent or expectancy of receiving some commercial or economic benefit.* This gives order and predictability to the legal system, from which individuals can attempt to give order and predictability to their lives.

*Second*, as further already discussed, under the principles of interstate federalism, *an individual does not exercise his right to travel at the expense of his due process rights*. Thus, to determine jurisdiction by the simple process of where the defendant was living at the time the cause of action arose is to unconstitutionally ignore this protection.

*Third*, jurisdiction that would be absent under *Pennoyer* might be present under *International Shoe* because of technological progress in the form of communication and transportation. The instant case takes this progress one step further. *Jurisdiction that may originally exist because of mobility may be lost for the same reason coupled with the passage of time.* "'Traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forums that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer v. Heitner, supra*, 433 U.S. at 212. Petitioner submits that finding personal jurisdiction in this case would be "perpetuating ancient forums" under *Pennoyer*, where the focus was more on residency at the time the cause of action arose, rather than on due process "minimum contacts."

## CONCLUSION

When an individual is entangled in the benefits and protections of a forum State's laws, he cannot complain when that State exercises its right of ordering him to defend a claim in its courts. But when there is innocent disentanglement, what were once "ripe" benefits and protections become "spoiled," and as a consequence, there no longer is any food to sustain the exercise of this right by the State. What once was a relationship between the State and individual has been replaced by a barrier, erected by the Due Process Clause, protecting all aspects of the liberty interest.

To allow California to order Petitioner to reappear and defend there when it last benefited or protected him over eight (8) years ago, would be to conclude that he did not leave that State with this liberty interest. Although acceptable where the sovereignty of each State is exclusive, such a conclusion does violence "to the principles of interstate federalism embodied in the Constitution" to which this Court recently said it would "remain faithful."

*World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 293.

Exclusive sovereignty has been replaced by co-equal sovereignty. When a cause of action arises has been replaced by "minimum contacts" pleasing to Due Process Clause. Accordingly, the opinion of the Fourth District Court of Appeal for the State of California should be replaced by an opinion of this Court reversing it. Respondent's remedy is to sue Petitioner in Washington.

Dated: July ____, 1986

Respectfully submitted,

LIGHTNER & CASTRO

By_____
KIM W. CHEATUM

*Attorneys for Petitioner*

# APPENDIX

## OPINION

**WORK J.**—Mary Louise Miller sought partition of her former spouse's military pension, a community asset which was omitted from the final judgment of dissolution of marriage. When Billy Gene Miller appeared specially, the court held it lacked personal jurisdiction to do so because Billy was neither a California resident, domiciled in this state, nor had consented to the jurisdiction of this court *as of the date the partition action was filed*. We hold the date as to which personal jurisdiction contacts are to be evaluated is the date when the parties' right to the property division arises and Billy's severing those contacts at a later time does not defeat out-of-state personal service on a subsequently filed lawsuit to effect that division. We reverse the order dismissing the proceedings.

### I

When Billy joined the United States Navy in 1948 at age 18, he listed his home of record as the State of Washington. In 1953 he married Mary in California, where they lived during his military assignment. The parties were still living in California when they separated in 1969. When Mary petitioned for dissolution of marriage that year, Billy cross-complained, alleging he was a California resident. The final judgment of dissolution entered on July 3, 1970, omitted the military retirement pension, but divided their community interest in their California residence and other California real property.

Billy retired from the Navy in 1970 and moved to New Jersey. On his military discharge papers, he again designated the State of Washington as his "home of record." Billy returned to California in 1972 and stayed for approximately three years. In 1975 he moved to Washington, where he since has continuously resided.

In December 1983, Mary sought declaratory relief to partition the undivided military pension. Billy appeared specially and

moved to quaash service of process and dismiss the proceedings. The trial court granted his motion, stating: "[My decision is] based on the Uniformed Services Former Spouses' Protection Act, 10 U.S. Code 1408.[¶] The Defendant in this case is not a resident nor domiciliary of California—wasn't at the start of the action and hasn't consented to jurisdiction, and this action is completely separate from the earlier divorce action or dissolution. This is a separate action in the nature of civil procedure seeking declaratory relief, and therefore there is no basis for jurisdiction, and the motion should be granted."

II

**(1a)** On appeal, Mary contends the trial court may assert personal jurisdiction over Billy under the federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), 10 United States Code[1] section 1408 or, alternatively, through California's long-arm statute (Cod. Civ. Proc., § 410.10).

FUSFSPA was enacted in the wake of *McCarty v. McCarty* (1981) 453 U.S. 210 [69 L.Ed.2d 589, 101 S.Ct. 2728], a Supreme Court case holding the federal legislative scheme authorizing military pensions impliedly preempted state community property law. FUSFSPA was specifically intended to reinvigorate the states' marital property laws affecting military pensions. (Sen. Rep. No. 97-502, 2nd Sess. (1982) p. 1; 1982 U.S. Code Cong. & Admin. News, p. 1596.) Section 1508(c)(1) provides: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

Two community property principles revitalized by FUSFSPA bear on this case. **(2)** The first is a vested military pension is a

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[1]All statutory references are to the United States Code unless otherwise specified.

divisible community asset. (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596 [111 Cal.Rptr. 369, 517 P.2d 449], disapproved on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164].) **(3)** The second is a military pension in which the community has an interest and which is omitted from the final dissolution judgment can be partitioned in a later civil action. (*Henn v. Henn*(1980) 26 Cal.3d 323, 330 [161 Cal.Rptr. 502, 605 P.2d 10].)

**(1b)** In *Henn*, the Supreme Court determined the spouses retained their interests in an unadjudicated asset as tenants in common. (*Ibid.*) "One reason for this rule is that in a legal sense after the rendition of a final judgment of dissolution disposing of the marital property, there can be no such thing as any remaining community property. . . . [Citations.] In other words, any property left undisposed by the judgment is either the separate property of one party or the other or the separate property of both parties and is outside the jurisdiction of the family law court." (*In re Marriage of Dorris* (1984) 160 Cal.App.3d 1208, 1215 [207 Cal.Rptr. 160].) Thus, a tenant seeking partition cannot assert continuing jurisdiction so as to litigate the matter *in the context of the prior dissolution action*. (Code Civ. Proc., § 410.50; *Bodle v. Bodle* (1978) 76 Cal.App.3d 758, 767 [143 Cal.Rptr. 115].)

FUSFSPA, while validating omitted pension partition actions, delimits the manner in which state courts may assert personal jurisdiction over military pensioners. (*In re Marriage of Jacobson* (1984) 161 Cal.App.3d 465, 469-471 [207 Cal.Rptr. 512].) Section 1408(c)(4) specifically provides: "A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."

III

According to the records in the underlying divorce action,[2] of which we take judicial notice, the parties were married in 1953 in San Diego, California and separated March 29, 1969. At the time of filing the complaint in June 1969, Billy was living in bachelor officers' quarters in California. The parties owned a vacant lot in San Diego and their residence in Chula Vista. Billy admitted the statistical data in the complaint and declared by way of cross-complaint that he "has been a resident of the State of California for more than one year and of the County of San Diego for more than three months next preceding [June 1969]."

IV

The trial court stated its belief that Billy was not a resident nor domiciliary "*at the start of the action. . . .*" Its reference clearly is to the start of the declaratory relief action in 1983. **(4)** However, for the purposes of obtaining personal jurisdiction over an out-of-state defendant, it is the residence or domicile of that person *at the time the operative facts which allow plaintiff to file an action converge* that is relevant, not whether the defendant has changed residence or domicile before the action is *filed*. (*Allen v. Superior Court* (1953) 41 Cal.2d 306 [259 P.2d 905]; *Myrick v. Superior Court* (1953) 41 Cal.2d 519 [261 P.2d 255]; *Owens v. Superior Court* (1959) 52 Cal.2d 822 [345 P.2d 921, 78 A.L.R.2d 388].) **(1c)** For instance, in *Owens, supra*, the issue was whether the out-of-state defendant was a resident of California *at the time his dog bit the plaintiff* causing the injuries for which suit was later brought. The fact the defendant changed his residence before suit was filed was deemed irrelevant.

Here, the essential facts regarding this property division dispute and the parties' respective legal interests became fixed when the parties separated. In this case, that date is no later than March

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[2]San Diego County Superior Court No. D-36159.

1969, the day of actual separation. Thus, Mary's interests, her entitlements and those of Billy arose at a time when Billy's cross-complaint declares under penalty of perjury he was a resident of California for the purposes of divorce jurisdiction.

V

In the context of a family law action, the court can both characterize and dispose of community property, but is limited only to characterizing separate property interests. (Civ. Code, § 4800.) **(5)** However, the nature and extent of the property interest itself does not differ between a spouse holding a community property interest and that same person holding that interest as a tenant-in-common. Nor, is there any practical difference to the parties between dividing community property and partitioning separate property. In each case it is the characterization and physical division of the identical property, whether characterized as community or as held in common tenancy. **(1d)** Here, the date on which the respective interests have to be measured is the date Mary and Billy separated, because that is the date after which any further accruals to the property became the separate property of the person whose earnings or efforts created that accrual.

**(6)** Moreover, under California law a spouse's entitlement to a share of the community property arises *at the time the property is acquired*. (*Henn v. Henn, supra*, 26 Cal.3d 323, 330.) The extent of that interest, once obtained, is not altered except by judicial decree or agreement. Thus, property not mentioned in pleadings as community property is left unadjudicated by decree of divorce and is subject to future litigation, the parties being deemed tenants in common meanwhile. (*Henn v. Henn, supra*, 26 Cal.3d 323, 330; *In re Marriage of Elkins* (1972) 28 Cal.App.3d 899, 903 [105 Cal.Rptr. 59].) **(7)** Billy and the trial court erred in assuming Mary's right to have the parties' property interests in the military retirement divided only arose after the final judgment of dissolution. That right vested no later than the separation in 1969. Although the partition action is filed postdissolution, the

respective interests in the property rights upon which it is based, including the right to force a division, were fixed when the parties separated.

VI

**(1e)** However, the critical issue here is whether Billy's substantial California contacts are of the type FUSFSPA requires (i.e., residency other than because of military assignment, domicile or consent). **(8)** These limits apparently reflect a concern that military pensioners could be substantially disadvantaged by forum-shopping spouses who otherwise might seek to divide these property interests in a state never having had substantial contact with the military pension, and whose courts are not easily accessible because of distance. (See discussion in Sen.Rep. No. 97-502, 2d Sess. (1982) pp. 8-9; 1982 U.S. Code Cong. & Admin. News, pp. 1603-1604.)

**(9)** This is not a case where there is any lack of substantial contacts, both personal and subject matter, or where deficiency of notice is suggested. Due process for jurisdictional purposes, both subject matter and personal, is amply satisfied.

**(1f)** Here, we have determined the date, as to which the contacts should be evaluated, is 1969. As of that date, Billy declared himself a California resident for the purpose of the jurisdictional requirements of obtaining a divorce from Mary. **(10)** Although termed "residency," the legal requirements for California divorce jurisdiction are synonymous with "domicile." (*Smith v. Smith* (1955) 45 Cal.2d 235, 239 [288 P.2d 947]; *Ungemach v. Ungemach* (1943) 61 Cal.App.2d 29, 36 [142 P.2d 99]; *In re Marriage of Thornton* (1982) 135 Cal.App.3d 500, 507 [185 Cal.Rptr. 388].)[3] **(1g)** Thus, for the purposes of personal jurisdiction, Billy

[3]See also *Whealton v. Whealton* (1967) 67 Cal.2d 656, 660 [63 Cal.Rptr. 291, 432 P.2d 979], to this effect, but suggesting that residential contacts less than domicile would satisfy due process, noting other states do not require domicile.

conclusively declared he was domiciled in California for more than one year prior to June 1969.[4]

The order quashing service is reversed and the matter is remanded for further proceedings.

Staniforth, Acting P.J., and Wiener, J., concurred.

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[4]Although some portions of the prior dissolution record were considered, the record does not suggest the trial court was apprised of Billy's declaration in the cross-complaint. Because the trial court's ruling was based on its finding of no residence, domicile or consent on the date the partition action was filed, Billy's admitted domicile in 1969 was irrelevant to its holding. Further, because Billy is now estopped from denying his California domicile as of 1969, there is no need to remand to reconsider this issue.

MARY L. TARVIN,
Plaintiff-Appellant,
v.
ALBERT L. TARVIN et al.,
Defendants-Respondents.

No. AO 23806
Santa Clara County
Super. Ct. No. 521616
California Court of Appeal
First Appellate District
Division One
Filed June 23, 1986

In this appeal we consider the question whether the California court has personal jurisdiction over a nonresident husband for purposes of dividing an omitted community property asset—husband's military pension. We conclude under the circumstances shown here that no personal jurisdiction existed.

## FACTS

Husband and wife were married in 1948. During their 22-year marriage husband was an officer in the U.S. Air Force, and the couple lived in many places. In 1971, while temporarily stationed in California, husband filed a petition for dissolution of the marriage as a California resident. Neither the petition nor the interlocutory decree made any mention of husband's military retirement pension.

In 1983 wife filed a separate action to partition the omitted asset. Husband made a special appearance to contest the jurisdiction of the California court. Husband declared that he left California in 1973 and had been a resident of Maryland since 1980; that he had no other contact with California; and that his pension is administered in Denver, Colorado, although the pension trust fund itself is located in Washington, D. C.

Wife appeals from the order granting husband's motion to quash service.

## DISCUSSION

There is no dispute that federal military pension benefits may constitute divisible community assets.[1] (In re Marriage of Fithian (1974) 10 Cal.3d 592, cert. denied, 419 U.S. 825.) And military pension benefits left unadjudicated in a dissolution action are held by the parties as tenants in common subject to partition in a later civil action. (Henn v. Henn (1980) 26 Cal.3d 323.)

Ordinarily, a court has jurisdiction to award title to a husband's pension rights if the court has either personal jurisdiction over him or in rem jurisdiction over the intangible pension rights. (Waite v. Waite, supra, 6 Cal.3d 461.) But under the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA, 10 U.S.C. § 1408), jurisdiction to divide federal military pension benefits is now limited: jurisdiction must be acquired on the basis of the military spouse's residence (other than by reason of military assignment), domicile or consent. (10 U.S.C. § 1408(c)(4).)[2]

Wife's theory of personal jurisdiction over husband has two parts. First, wife contends the jurisdiction of the California court acquired in the 1971 divorce proceeding continues unabated to the present proceeding. This theory is plainly unsound.

Unquestionably, the California court had personal jurisdiction over husband in the dissolution action. By bringing the action he submitted himself to the jurisdiction of the court for the purposes of that proceeding. (Mikulski v. Mikulski (1969) 2 Cal.App.3d 1047, 1051; Maloney v. Maloney (1944) 67 Cal.App.2d 278, 280.) In matters of child custody, child support or spousal support, the court does retain continuing jurisdiction to modify the awards even if the other spouse is no longer residing in this state. (Code Civ. Proc., § 410.50, subd. (b); Bergan v. Bergan (1981) 114 Cal.App.3d 567, 570; Leverett v. Superior Court (1963) 222 Cal.App.2d 126.) But once a dissolution decree has become final, the court has no further jurisdiction to modify the terms of judgment regarding property rights. (In re Marriage of Davis (1980) 113 Cal.App.3d 485, 487; Bodle v. Bodle (1978) 76 Cal.App.3d 758, 767; In re Marriage of Cobb (1977) 68 Cal.App.3d 855, 860, fn. 1; see Miller v. Miller (1981) 117 Cal.App.3d 366, 371; see 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 336, p. 755.)

Arguing by analogy to cases involving custody and support awards, wife contends that California courts have similar continuing jurisdiction to divide the omitted community property. The analogy is inapt. Property rights are not treated in the same manner as continuing custody and support issues. The underlying lawsuit for division of community property is a wholly separate and independent action not a subsequent proceeding within the original dissolution action. (Henn v. Henn, supra, 26 Cal.3d 323, 330-332; In re Marriage of Davis, supra, 113 Cal.App.3d 485.) Consequently, the trial court has no authority to render a personal judgment against defendant-husband unless jurisdiction again attaches. (See Kumar v. Superior Court (1982) 32 Cal.3d 689, 703-704 [father's California habeas petition to establish visitation rights did not provide personal jurisdiction in separate action for child support].)

The second part of wife's theory of personal jurisdiction is provided by the recent decision in Miller v. Miller, supra, 176 Cal.App.3d 1183, review denied Apr. 23, 1986. There, on substantially parallel facts, the court held that the FUSFSPA requirement of domicile or residency could be met by looking at the defendant-husband's past residency. Analogizing to personal injury actions, the Miller court held that the time for determining personal jurisdiction contacts is not the date the partition action was filed, but rather "the date when the parties' right to the property division arises" (id., at p. 1186), which the court ultimately concluded was the date of separation. It is at that time, the court reasoned, that the parties' interests in the military pension, including the right to force a division of the asset, became fixed. (Id., at p. 1189.)

With due respect, we cannot subscribe to the Miller rationale. First, a husband and wife have no right to partition their community assets before a dissolution decree is entered. (Code Civ. Proc., § 872.210, subd. (b); Jacquemart v. Jacquemart (1956) 142 Cal.App.2d 794.) Thus, the date of separation could not be the time the right to divide the pension benefits arose.

Nor do we think that an action for division of an omitted community asset can be logically equated with personal injury actions for purposes of in personam jurisdiction. The actionable injury which occurs in those cases does not exist in a partition action.[3]

Upon dissolution of a marriage, the parties hold title to any undivided community assets as tenants in common, and that cotenancy continues until terminated by future litigation or agreement. (Henn v. Henn, supra, 26 Cal.3d at p. 330.) An action to divide an asset held in cotenancy merely ascertains and allocates to the parties their respective shares; it does not return or restore anything lost. After partition, both tenants have exactly the same proportionate interest in the property they had before. (48 Cal.Jur.3d, Partition, § 2, pp. 239-240; 16 Cal.Jur.3d, Part 1 (rev.) Cotenancy and Joint Ownership, § 20, pp. 207-208.) Thus, unlike a personal injury claim, the right of action for partition does not arise from an "operative" event. By the very nature of cotenancy, the mere filing of an action by one cotenant is all that is needed to dissolve the cotenancy. (See Bradley v. Harkness (1864) 26 Cal. 69, 77 [mere desire of one tenant is sufficient to justify partition].) And that action may be filed at any time. There is no limitations period for a partition action. (Elbert, Ltd. v. Nolan (1948) 32 Cal.2d 610, 616.)

Thus, we think the Miller court intuits too generously in determining that the right to divide the parties' unadjudicated property "vested" when the parties separated. (176 Cal.App.3d at p. 1189.) As we view it, no right of action for division of an omitted community asset could mature until such time as one of the former spouses actually institutes an action seeking to partition their cotenancy interests. Due process concerns dictate that the time for evaluation of jurisdictional contacts should be the time that the partition action is filed.

Moreover, although the Miller analysis acknowledges the settled principle that jurisdiction to divide property rights ends once the dissolution decree becomes final (176 Cal.App.3d at p. 1187), the rule seemingly evanesces in the court's ultimate conclusion. By focusing on husband's past residency in the state, the Miller court failed to recognize that the partition action is a separate and independent action for which personal jurisdiction must be acquired. Indeed, as our high court in Owens (upon which Miller relied) cautioned: "the mere fact of past domicile in the state would not subject [the defendant] to its jurisdiction indefinitely, for a past domicile having no relationship to the litigation at hand would not afford a

reasonable basis for an assertion of jurisdiction." (52 Cal.2d at p. 829.) Here, unlike Owens, the underlying cause of action did not arise out of husband's activity in California. Although husband failed to list his military pension as an asset in the California dissolution action, wife also omitted the asset. Moreover, husband's "vested" pension rights had not matured during his brief California residency. Husband's past residency in California bears only a remote connection to the pending partition action.

In summary, wife's present action is a separate and independent action for which jurisdiction must be newly acquired. None of the jurisdictional grounds specified in FUSFSPA apply here: at the time the partition action was filed, husband—who denied jurisdiction—neither resided in California nor had any other contacts with the state. We conclude that the order quashing service was properly granted.

The order appealed from is affirmed.

RACANELLI, P.J.

We concur:

NEWSOM, J.

HOLMDAHL, J.

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1. At the time of the parties' 1971 dissolution, retirement benefits attributable to employment during marriage constituted a community asset to the extent they had vested. (Phillipson v. Board of Administration (1970) 3 Cal.3d 32; Benson v. City of Los Angeles (1963) 60 Cal.2d 355; see also Waite v. Waite (1972) 6 Cal.3d 461.) Nonvested pension rights were considered a mere expectancy not subject to division. (French v. French (1941) 17 Cal.2d 775, 778 [husband needed 14 more years of service to be eligible for retirement pay]; Williamson v. Williamson (1962) 203 Cal.App.2d 8, 11 [husband had not completed the necessary 20 years of service to be eligible to retire].) But a pension was considered vested if the working spouse was eligible for retirement even though he had not yet elected to retire. (Bensing v. Bensing (1972) 25 Cal.App.3d 889, 892-893 [husband with 28 years in the Air Force was fully eligible to retire but chose to continue working]; see also In re Marriage of Martin (1975) 50 Cal.App.3d 581, 584; In re Marriage of Peterson (1974) 41 Cal.App.3d 642, 647-652.)

In the present case, husband had 22 years of service in the Air Force at the time of the dissolution decree. His retirement benefits were vested and a community asset subject to division.

2. FUSFSPA was enacted to abrogate the holding of McCarty v. McCarty (1981) 453 U.S. 210. Subsection (c)(4) was apparently included in the legislation in response to concerns about "forum-shopping" spouses who might seek to divide the military pension in a state lacking substantial contacts with the pensioner. (See Miller v. Miller (1986) 176 Cal.App.3d 1183, 1189; see generally 1982 U.S. Code Cong. & Admin. News, pp. 1571, 1603-1604, 1635, 1639-1640.)

3. The cases relied upon by the Miller court involved activity by the defendant while domiciled in California. Both Allen v. Superior Court (1953) 41 Cal.2d 306 and Myrick v. Superior Court (1953) 41 Cal.2d 519, involved auto injury actions arising from defendants' intrastate activities and commenced while defendants were still domiciled in California. In Owens v. Superior Court (1959) 52 Cal.2d 822 (a dog bite case), personal jurisdiction over the nonresident defendant was upheld on the basis of the dog owner's California domicile when the cause of action arose.